2003-2004 BTG FEDERAL UPDATE
Cases since Outline Submitted

I. CIVIL LITIGATION AND PROCEDURE

A. Jurisdiction

1. Rural Ia. Ind. Telephone Ass'n v. Ia. Util. Bd., 362 F.3d 1070 (8th Cir. 2004). RIITA's lawsuit which challenged IUB's interpretation of an FCC order rather than the validity of the order was not subject to the Hobbs Act, which would have required a challenge to orders of the FCC to be determined by the court of appeals.

2. Hunter v. Underwood, 362 F.3d 468 (8th Cir. 2004). Ultimately, federal court did not have jurisdiction over a state housing agency involved in extensive litigation over termination of plaintiff's lease (with four separate appeals over four separate actions) in order to conduct judicial review, although with respect to first action plaintiff initiated, court determined the agency had grounds to terminate the lease without reaching the jurisdictional issue. That there may been "[a]n error in interpreting jurisdiction or in assessing jurisdictional facts" did not void the original judgment, particularly where the complaining party is the one who brought the original suit and did not question jurisdiction until after she lost.

3. Johnson v. City of Shorewood, 360 F.3d 810 (8th Cir. 2004). Federal district court did not have jurisdiction of takings claim on which plaintiffs had already obtained a state court decision based on full faith and credit principles and the Rooker-Feldman doctrine, which would require the state court decision be reviewed only by the U.S. Supreme Court.

4. Anderson v. Dassault Aviation, 361 F.3d 449 (8th Cir. 2004). In product liability case involving injuries to flight attendant incurred while she was working in a jet manufactured by defendant, a French corporation, Dassault had sufficient contacts with Arkansas to sustain assertion of personal jurisdiction over it based on its business relationship with its distributor, a wholly owned subsidiary called Dassault Falcon Jet Corporation, which operated a production site in that state, even though the jet in question was manufactured in France and then flown to Little Rock.

5. GMAC Commercial Credit v. Dillard Dep't Stores, 357 F.3d 827 (8th Cir. 2004). Reminding us that subject matter jurisdiction may be raised at any time, even after judgment, question of GMAC's citizenship as an LLC was remanded for further proceedings as citizenship of LLC is that of its members for diversity jurisdiction purposes ("issue of first impression in our circuit").

6. Aaron v. Target, 357 F.3d 768 (8th Cir. 2004). Although federal suit for injunctive relief was first filed, Younger abstention is not driven by the principle of "first in time" and district court should have examined the facts and context of the parallel proceedings, where it should have found that state condemnation proceeding actually began with passage of ordinance declaring the property to be blighted or insanitary, an event which took place several weeks before the federal lawsuit was filed.

7. Simes v. Huckabee, 354 F.3d 823 (8th Cir. 2004). In a case involving the jailing of members of a "quorum court" for refusing to vote in favor of referring a tax initiative to county voters, Rooker-Feldman doctrine did not prevent federal claims from being brought in federal court if state court was previously presented with same claims and declined to reach the merits of federal claims.

B. Procedure

1. Capitol Indemnity Corp. v. Russellville Steel Co., Inc., ___ F.3d ___, 2004 WL 840241 (8th Cir. April 21, 2004). In this case the Eighth Circuit for the first time adopts the "total activity" test for determining a corporation's "principal place of business" for diversity purposes, with a dissent by Judge Colloton.

2. MM&S Financial, Inc. v. NASD, Inc., ___ F.3d ___, 2004 WL 784752 (8th Cir. April 14, 2004). Where plaintiff's late-filed motion to amend complaint to bring a breach of contract claim (after magistrate judge recommended granting a motion to dismiss on the basis there was no private right of action under 15 U.S.C. § 78s(g)(1)), court did not abuse its discretion in denying leave to amend as the breach of contract claim would have been futile on the same basis.

3. Little Rock School Dist. v. Armstrong, 359 F.3d 957 (8th Cir. 2004). Judge, who twenty years earlier had represented judge of school desegregation case in mandamus proceeding, was not required to recuse himself from same

desegregation case (which was still pending) as mandamus proceedings did touch upon merits of desegregation case.

4. Highland Industrial Park v. BEI Defense Systems, 357 F.3d 794 (8th Cir. 2004). In diversity cases, district court applies law of forum state to determine statute of limitations issues, here those of Arkansas, which applied its own statutes of limitations to cases filed in its courts. Plaintiff's tort claims for contaminant damage to land it had leased to defendant were barred based on knowledge of contamination to the land prior to a 1997 report indicating the groundwater was contaminated. The only claim not barred was one for breach of contract to surrender the property "in as good a condition and state of repair as when received," which would not have accrued until defendant vacated the property.

5. Crossley v. Georgia-Pacific Corp., 355 F.3d 1112 (8th Cir. 2004). Plaintiff's response to summary judgment motion which consisted of submission of full transcripts from six depositions without accompanying designation of the specific facts therein creating genuine issues of material fact failed to meet Rule 56's specificity requirement. Summary judgment was appropriately granted.

6. Bediako v. Stein Mart, Inc., 354 F.3d 835 (8th Cir. 2004). After a "misunderstanding" concerning this African-American female's conduct at a department store (store employees thought she was going to rob them after a pocket knife dropped out of her fanny pack as she searched for a credit card and then realized she had dropped her car keys somewhere in the store), plaintiff brought an action under 42 U.S.C. § 1981 claiming she was denied full and equal benefit of the laws. Nearly a year later defendant filed a motion for summary judgment and after the close of discovery, plaintiff for the first time raised a right to contract claim under § 1981. The circuit held the trial court did not abuse its discretion in denying leave to amend "[g]iven the advanced stage of the litigation process" and plaintiff's new theory.

7. United States v. Cuervo, 354 F.3d 969 (8th Cir. 2004). For a case which nearly covers the landscape of possible appealable issues, read this complicated multi-defendant drugs and guns conspiracy case.

C. Evidence

1. Seibel v. JLG Industries, 362 F.3d 480 (8th Cir. 2004). In a design defect case under Iowa law, it was undisputed that a "kill switch" had been removed from the controls of a scissors lift and that its purpose would have prevented inadvertent operation; therefore, plaintiffs could not prove the

lift was in substantially the same condition as when it left the control of defendant.

D. Sanctions

1. Jake's, Ltd. v. City of Coates, 356 F.3d 896 (8th Cir. 2004). A fine of $1,000 per day for 68 days Jake's continued to conduct a type of sexually-oriented business prohibited by local ordinances (from live nude dancing to clothed lap dancing) in violation of the court's previous injunction was punitive in nature, requiring the protections of a criminal contempt proceeding before imposition of the fine.

2. Stevenson v. Union Pac. RR Co., 354 F.3d 739 (8th Cir. 2004). Sanction of adverse inference jury instruction for defendant's prelitigation destruction of tape-recorded voice communications of train crew was within court's discretion, as was same sanction for destruction of track maintenance inspection records after litigation was commenced; however, prelitigation destruction of track maintenance records based on document retention policy was not in bad faith, particularly where defective track maintenance was not alleged to have caused an accident.

3. Norsyn, Inc. v. Desai, 351 F.3d 825 (8th Cir. 2003). Defendants' removal of action to federal court, even though they were not properly served in the underlying state court action, did not obligate them to respond to the complaint - "a defendant is under no duty to respond to the rules of a court unless he is brought under its jurisdiction through the proper service of process." Plaintiff's motion for default was properly denied. Furthermore, court's dismissal without prejudice based on plaintiff's failure to make timely service was not an abuse of discretion. However, court's award of sanctions was an abuse of discretion where defendants had not filed a formal motion for sanctions but relied only on the district court raising the issue *sua sponte*.

II. CRIMINAL LAW

A. Criminal Acts

1. United States v. Maxwell, 363 F.3d 815 (8th Cir. 2004). Evidence to demonstrate constructive possession of firearm was sufficient to sustain conviction on charge of felon in possession where defendant was observed with two females in the backyard of a house where police had observed a gun being fired on New Year's Eve, ran when police approached, and admitted shooting the gun when they caught him, in fact when told there was a $75 fine said he should have shot off more

rounds.

2. United States v. Corum, 362 F.3d 489 (8th Cir. 2004). Telephone threats to destroy several synagogues with bombs were made by use of "an instrument of interstate commerce," i.e., a telephone, even though the phone calls were made intrastate and application of the statute prohibiting such conduct did not violate the Commerce Clause. Furthermore, the Church Arson Prevention Act under which defendant was charged does not violate the Establishment Clause of the First Amendment.

3. United States v. Ramirez, 362 F.3d 521 (8th Cir. 2004). Documents found inside the truck defendant was driving showing he had four different vehicles registered in his name authorized to cross from Mexico to California, Arizona and Texas, "inconsistent and improbable explanations for his trip," a lie regarding a plan to meet his uncle, incriminating statements, "implausible trial testimony regarding his registration of the truck and relationship with an individual identified only as 'Polo;'" and expert testimony about methods of drug traffickers establishing intent to distribute 35 pounds of methamphetamine found in defendant's truck.

4. United States v. Hirsch, 360 F.3d 860 (8th Cir. 2004). After defendant was acquitted of a charge of being a drug user in possession of firearms, he was charged with perjuring himself during his testimony at that trial concerning whether his GMC Jimmy in which the firearms were found had been located on the property on which it had been searched for over two months. The fact that defendant was acquitted on the first trial was not by itself proof of vindictive prosecution, as he claimed.

5. United States v. Crenshaw, 359 F.3d 977 (8th Cir. 2004). Statute complementing RICO by federalizing commission of murder in aid of racketeering activity, 18 U.S.C. § 1959, was constitutional even as applied to violent activity occurring intrastate; here a fight between rival gangs ended up with the shooting of a four-year-old who was a passenger in a car driven by a member of one of the gangs.

6. United States v. Springer, 354 F.3d 772 (8th Cir. 2004). Because the rulemaking process concerning the removal of fenfluramine, a diet drug, from the list of Schedule IV controlled substances was not complete at the time defendants purchased the substance overseas and had it imported under a false Customs declaration, it was still considered a controlled substance within the meaning of the statute prohibiting its import, 21 U.S.C. § 952(b), and the conspiracy count charging

defendants' violation should not have been dismissed.

B. Procedure

1. United States v. Walker, 363 F.3d 711 (8th Cir. 2004). A superceding indictment and original indictment can co-exist; it is not necessarily the case in this circuit that a superceding indictment dismisses the original.

2. United States v. Flores, 362 F.3d 1030 (8th Cir. 2004). Co-defendant was not entitled to severance of trial in drug trafficking case: he was not prejudiced by admission of co-defendant's testimony as it would have been admissible in a severed trial; the evidence against the co-defendant was only slightly stronger; and the court gave cautionary instructions which minimized any prejudice. Trial court could not rely on jury's finding of guilt to enhance defendant's sentence on the basis of obstruction of justice by virtue of defendant's committing perjury on the witness stand; the court must "independently review the testimony and make its own determination" whether perjury was committed.

3. United States v. Benford, 360 F.3d 913 (8th Cir. 2004). Defendant was the only participant charged with a count of conspiracy to distribute cocaine base and argued that a multiple conspiracy was shown at trial rather than the single conspiracy charged in the indictment. The finding of a single conspiracy was supported by evidence of a "common goal [of] the possession and sale of large quantities of crack cocaine in east Omaha, . . . over a long period of time. . . includ[ing] members of the same street gang."

4. United States v. Allen, 357 F.3d 745 (8th Cir. 2004). The government's failure to include a statutory aggravator in an indictment for which the death penalty was sought was not harmless beyond a reasonable doubt: an indictment charging bank robbery and the commission of murder in the course of that activity in one count and knowing use of a firearm during a crime of violence in the second count did not state facts constituting the pecuniary gain aggravator the government argued was covered by the counts.

5. United States v. Rojas, 356 F.3d 876 (8th Cir. 2004). Defendant's day of trial objection to appearing at trial in prison clothing was untimely -- the court questioned defendant about his efforts to obtain other clothes (his family was not cooperative), gave him a chance to obtain different clothes, and defendant agreed to proceed as is; therefore defendant was not compelled to attend in prison clothes.

C. Search and Seizure

1. United States v. Flores-Montano, ___ U.S. ___, 124 S. Ct. 1582 (2004). Removal and disassembly of gas tank of defendant's vehicle in the course of border search in southern California did not require reasonable suspicion; plenary authority is granted for routine searches and seizures at the borders.

2. Groh v. Ramirez, ___ U.S. ___, 124 S. Ct. 1284 (2004). A warrant which did not list the things to be seized was plainly invalid, even though the application for the warrant described the things; therefore, the search which took place with it was warrantless and presumptively unreasonable; officer who executed warrant was not entitled to qualified immunity as the warrant particularity requirement is set forth in the Constitution and he could not reasonably claim to be unaware of the requirement.

3. Fellers v. United States, ___ U.S. ___, 124 S. Ct. 1019 (2004). Where officers "deliberately elicited" information from defendant at his home after he had been indicted, without counsel and without a Miranda waiver, defendant's Sixth Amendment rights were violated and case was remanded to district court for determination whether subsequent jailhouse statements with waiver were fruit of the previous tainted questioning.

4. Illinois v. Lidster, ___ U.S. ___, 124 S. Ct. 885 (2004). Defendant was arrested for driving while intoxicated after he was stopped at a checkpoint stop which police had set up to seek information about an accident the week before involving a fatality. Because the purpose of the checkpoint stop was to ask the public for information about a crime committed by others, and not to "ferret out" crimes being committed by the motorists themselves, it was constitutionally permissible under the Fourth Amendment.

5. Maryland v. Pringle, ___ U.S. ___, 124 S. Ct. 795 (2003). Arrest of front-seat passenger for possession with intent to distribute cocaine and possession of cocaine when cocain was found behind an armrest in the back seat was based on probable cause: the car in which defendant was passenger was stopped for speeding early in the morning and all three occupants denied ownership of drugs and money found in a search of the car. The Supreme Court held it was a reasonable inference under the circumstances that any or all of the occupants knew of and exercised control over the drugs.

6. United States v. Mendoza-Gonzalez, 363 F.3d 788(8th Cir. 2004). No Fourth Amendment violation occurred as a result of a DOT inspection of the semitractor defendant was driving which officer observed did not display required DOT or ICC numbers or fuel tax stickers. In the course of conducting the inspection the officer checked under a mattress in the sleeper compartment to find the required occupant restraints and observed what he believed, and what subsequently turned out to be, marijuana. In fact, it turned out the tractor was loaded with over three hundred pounds of marijuana and a substantial quantity of pure methamphetamine.

7. United States v. LeBrun, 363 F.3d 715 (8th Cir. 2004). Last year I visited with you at length about the circumstances of a confession which was suppressed in this case. Petition for rehearing en banc had been granted. In its recent opinion written by Judge Hansen, the panel in a 7-4 decision reversed the judgment suppressing defendant's confession. The questions were in custody interrogation and voluntariness of confession. The Court held defendant was not in custody and the confession was voluntary, determining first that the standard of review for custody determinations was to "uphold findings of historical fact unless clearly erroneous, but . . . apply the controlling legal standard to the historical facts utilizing an independent review." Applying this standard, the circuit first discounted the factors given weight by the district court as being irrelevant: the interview in a "small, windowless room" at the police station; the use of "deceptive interview tactics;" the design of the interview to "produce incriminating responses;" and the agents' "falsely trump[ing] up the evidence they said they possessed." The circuit's finding defendant was not in custody rested on three factors: his possession and ability to use a cellphone; the brevity of the interview; and defendant's education, background and past experience with the investigators. That he mistakenly believed he would not be prosecuted the court held did not invalidate what it found to be the voluntariness of his confession -- the standard is "whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination."

8. United States v. Gerard, 362 F.3d 484 (8th Cir. 2004). Officer who was investigating why two suspects involved in an earlier stolen vehicle chase had defendant's credit card used an extension ladder lying on the ground to climb up and look through a vent into a garage on defendant's farm property. The lights were on and music was playing, yet no one responded to the officer's knock. As he climbed the ladder, he smelled marijuana, climbed back down and called his supervisor for a search warrant, execution of which uncovered marijuana. The garage was held to be not within the curtilage of the house on the property as it was across a driveway and not enclosed with the house and fencing. Trees around the property in this case did not mark the curtilage where there was internal fencing. The garage was not blocked from public view, no signs were posted excluding strangers and defendant left the vent unblocked.

9. United States v. Logan, 362 F.3d 530 (8th Cir. 2004). Subjecting package at commercial mail receiving agency (CMRA) to a dog sniff was a seizure which required reasonable suspicion, which was found in investigating officer's articulation of characteristics typical of a drug-package profile: shipment from a drug source city to a drug target city; shipment from one CMRA to another CMRA; second-day air delivery shipment; handwritten name and address of recipient. Note in dissent, Judge Smith notes the officer's actual inexperience in mail-center drug interdiction as detracting from probable cause.

10. United States v. Scroggins, 361 F.3d 1075 (8th Cir. 2004). The circuit held the federal "no-knock" statute, 18 U.S.C. § 3109, is co-extensive with the Fourth Amendment. Applying Fourth Amendment analysis to a search under a no-knock warrant, it was a close call whether the magistrate's warrant dispensing with the knock-and-announce requirement was based on sufficient exigent circumstances; however, the question before the circuit was whether the police had a good faith reliance the authorization of the warrant, triggering a Leon good-faith analysis of the affidavit, which stated defendant was part of a large drug organization, had prior arrests for drugs and guns, that known drug dealers visited his house often, and that a live round from an assault weapon was found in defendant's trash.

11. United States v. Martinez, 358 F.3d 1005 (8th Cir. 2004). Law enforcement officers in Missouri tried a variation on a previously litigated "ruse checkpoint" at Sugar Tree Road exit along Interstate 44, posting signs along the road indicating a drug checkpoint was ahead but stopping only vehicles which committed traffic violations (in a previous case the checkpoint was held to violate the Fourth Amendment because *every* vehicle which took the exit was stopped). Defendant traveling east took the exit, ran a stop sign and took the overpass to go back west and was stopped for the traffic violation, during the course of which he was questioned about his destination, was observed to be "extremely nervous" and consented to a search of his truck. A drug dog alerted to the trailer and a bag containing 17 kilos of cocaine was found in the trailer. No Fourth Amendment violation occurred with this ruse stop as defendant was stopped for the traffic violation, not because officers believed he was carrying drugs.

12. United States v. Ketzeback, 358 F.3d 987 (8th Cir. 2004). Although information that a confidential informant had a criminal record (in the form of a an arrest on charges for misdemeanor theft) and had previously used drugs was omitted from an application for a search warrant, supplementing the affidavit with the omitted information still supported a finding of probable cause as the CI's information about defendant's drug activity was unrelated to the charges for which the CI had been arrested, the CI knew details about defendant which could be independently corroborated, and the affidavit contained information that defendant was on probation for similar activities.

13. United States v. Salter, 358 F.3d 1080 (8th Cir. 2004). Search warrant issued on affidavit which detailed a shooting and five hour stand-off at defendants' residence, its appearance as "bunker-style" with gun turrets, the defendant's son apparent handling of explosives during the standoff and the defendant father's reaction, the defendants' communications by military hand signals, the defendants' attempts to prevent officers from observing the contents of the residence, including the numerous firearms; prior complaints from area residents about gunfire and explosions; father's comments about son's intent and about explosives kept on the premises and an officer's observation of assault weapons was based on probable cause, even without the father's comments, which were tainted.

14. United States v. Pratt, 355 F.3d 1119 (8th Cir. 2004). Because officers observed defendant committing a

violation of local law (walking in the middle of the street), they had probable cause to arrest him and therefore probable cause to conduct a search of his pockets incident to the lawful arrest.

15. United States v. White, 356 F.3d 865 (8th Cir. 2004). Probable cause for search was not eliminated by inconsistency between date on application for warrant and date on search warrant (which occurred when officer forgot to change the date on a preprinted form). Also, since the specific type of firearm of which a felon is found in possession is not an essential of that offense, that the firearm found (a .357 Sturm Ruger revolver) was misidentified in the jury instructions (as a .38 Sturm Ruger revolver) does not misstate the law.

16. United States v. Morones, 355 F.3d 1108 (8th Cir. 2004). Although district court erred in determining a seizure did not occur when drug interdiction agent removed a package from conveyor belt at a FedEx facility in California, probable cause for seizing the package still existed at that point based on the characteristics of the package considered in light of the agent's experience: the label was handwritten; its delivery was paid for in cash, it was shipped "priority overnight;" the sender and recipient had the same last name and the phone number of neither was provided.

17. United States v. Gill, 354 F.3d 963 (8th Cir. 2004). Exigent circumstances for preliminary warrantless search of defendant's residence were presented by report that someone had jumped from window of what turned out to be defendant's apartment and was trying to climb back up inside the building; by defendant's appearance to officers responding at the scene with mud on his clothes and shoes and unidentified blood on his shirt and disoriented responses, including attempting to run off and attempt a standoff with a bar code scanning device. After securing defendant at the police station, the blood on his shirt led some officers to return to the apartment and attempt to look in the still open window to see if someone had been injured, going to the extent of calling the fire department to bring a ladder. Evidence observed as a result of looking through window and climbing in to secure premises (handgun on floor, assault rifle on floor under window sill, stacks of currency on kitchen counter, drug-production items visible through open cabinets) were in plain view and changed the nature of the exigency, justifying the extended "sweep" of the premises.

18. United States v. Martinez, 354 F.3d 932 (8th Cir. 2004). Truck with California license plate driven by Hispanic defendant briefly crossed fog line as it traveled eastbound on interstate in South Dakota. Trooper traveling westbound observed license plate and ethnicity of one occupant of the vehicle, as well as the one incident of crossing the line and stopped the vehicle. Trooper's drug dog alerted to vehicle; officer unsuccessfully searched the vehicle, questioned the driver about his nationality and immigration status and called the Border Patrol. Subsequent search of vehicle after defendants were taken into custody came up with 4,931.9 grams of cocaine inside the back seat. Two Judges on the panel affirmed denial of motions to suppress on the basis the original stop was lawful. Judge Lay's dissent discusses his viewpoint that racial profiling had occurred.

D. Due Process/Evidence

1. Crawford v. Washington, ___ U.S. ___, 124 S. Ct. 1354 (2004). Admission of recorded statement by defendant's wife during police interview after she did not testify at trial due to Washington state's marital privilege violated Confrontation Clause.

2. Banks v. Dretke, ___ U.S. ___, 124 S. Ct. 1256 (2004). The state suppressed material exculpatory evidence linking two witnesses to the police; defendant eventually discovered this and raised Brady claims in federal habeas proceedings, which commenced prior to AEDPA. To enable him to produce evidence in federal court concerning those claims, defendant had to show cause and prejudice for his failure to develop the facts in state court, which coincided with proof of his Brady claim as to one witness. Banks was able to show cause: the state knew of the evidence; Banks relied on the state's eve of trial assertion it had disclosed all Brady material, and in response to his state habeas petition the state denied Banks' assertions regarding the suppressed evidence.

3. Illinois v. Fisher, ___ U.S. ___, 124 S. Ct. 1200 (2004). Although defendant's discovery request for all trial evidence in a 1988 case charging him with possession of cocaine pended for some ten years (defendant failed to appear for trial and was not apprehended until 1999), during that period the state destroyed the evidence in accordance with its standard procedures. The existence of a pending discovery request did not show bad faith on the part of the police, a required showing, therefore, due process was not violated.

4. United States v. Flute, 363 F.3d 676 (8th Cir. 2004). Prosecutor's comment in response to an objection to a question on direct examination that "defense 'didn't want this to come up'" was not prejudicial to defendant: "it was one isolated comment in a three-day trial;" the other evidence against defendant was great and the trial court took prompt curative action.

5. United States v. Mahasin, 362 F.3d 1071 (8th Cir. 2004). Recordings of telephone conversations defendant had from jail with some unidentified individuals were properly admitted under Fed. R. Evid. 801(d)(2)(E) as statements by a party's coconspirator: declarant did not have to be formally charged in conspiracy nor be identified as long as the statement was sufficiently reliable. Trial court's handling of juror notes concerning deadlock (informing them he had to consult with counsel and directing them to continue their deliberations) was not plain error; the court had not completed discussing formal response and then had decided to take up question in presence of defendant when jury concluded their deliberations.

6. United States v. Rose, 362 F.3d 1059 (8th Cir. 2004). Mahasin's co-defendant was charged with witness tampering in connection with Mahasin's case (witness was accosted by a male and shot). Victim was shown photographic lineup in of six individuals, including defendant and a few others known to be associated with Mashasin. Argument that defendant's picture was distinctive because his eye were shut and he had very short hair was not "unduly or impermissibly suggestive" where the physical features of all individuals were consistent with the victim's description and with defendant's features.

7. United States v. Reyes, 362 F.3d 536 (8th Cir. 2004). Admission of statements of co-conspirator through testimony of investigating agents did not violate the Confrontation Clause and defendants could not compel the co-conspirator (who would take the Fifth Amendment if called) to appear and be silent -- "absent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege," as it is rare that the Federal Rules of Evidence permit argument of inferences arising from a witness's invocation of privilege.

8. United States v. Beaman, 361 F.3d 1061 (8th Cir. 2004). Prosecutor's argument that referenced two witnesses as "two nice ladies" was not improper vouching, particularly where defense counsel had argued they were seeking closure as victims.

9. United States v. Brown, 360 F.3d 828 (8th Cir. 2004). Challenging conviction for assault on a foster child, defendant claimed a violation of Brady arising from the government withholding CT scans of the child; however, her failure to allege what the scan would have shown or that it even existed for certain did not prove a Brady violation, only speculation.

10. United States v. Salcedo, 360 F.3d 807 (8th Cir. 2004). The government's use of defendant's pre-Miranda, pre-arrest statement that he was preparing to change the oil on his car (in which he had been in the process of preparing to hide cocaine, as evidenced from the carpeting being pulled away in the trunk walls, the presence of nuts and rivets in a coat pocket identical to others in the trunk and the presence of his fingerprints on a package of cocain found in the garage), was not a derivation from the government's statement at pretrial that it would be using statements from co-defendants; government's interpretation of magistrate judge's question regarding statements was for post-Miranda statements and government had disclosed defendant's pre-Miranda statement to counsel in discovery; furthermore, no prejudice was shown in the face of the evidence against defendant.

11. United States v. Buffalo, 358 F.3d 519 (8th Cir. 2004). A case demonstrating the interplay between revised Fed. R. Evid. 607, which now allows any party to attack the credibility of a witness, even the party calling the witness, and Rule 613(b), which allows admission of prior inconsistent statements in limited circumstances. Here the circuit found defendant should have been allowed to call witnesses to testify that another person, who defendant had called as a witness and who testified he would have liked to have been the one to "get his hands on" the victim, confessed to assaulting the victim. However, the trial court did not err in prohibiting evidence of the victim's tendency to get into fights as the defense was that defendant was out of town.

12. United States v. Davis, 357 F.3d 726 (8th Cir. 2004). In a methamphetamine conspiracy case, evidence that defendant had threatened and beat women was admissible as showing the lengths to which defendant would go to protect the conspiracy.

13. United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004). Defendant here was charged with aggravated sexual abuse of his son and daughter. Defendant should have been allowed to call foster care parent to testify regarding her

opinion of the son's credibility as she had daily contact with him for four to six months; exclusion of her opinion, for which proper foundation was laid, violated defendant's right to put on witnesses in his defense.

E. Right to Counsel

1. Iowa v. Tovar, ____ U.S. ____, 124 S. Ct. 1379 (2004). The Sixth Amendment does not require the court to advise a defendant who is waiving counsel at the plea stage of the risks inherent in such a waiver.

2. United States v. Greatwalker, 356 F.3d 908 (8th Cir. 2004). The fair-cross section requirement of the Sixth Amendment was not violated by the jury selection process in North Dakota, which defendant argued excluded Native Americans, as there was no proof Native Americans were excluded from registering to vote or from voting.

F. Sentencing

1. United States v. Courtney, 362 F.3d 497 (8th Cir. 2004). Pharmacist who diluted chemotherapy drugs pled guilty to eight product-tampering offenses and twelve adulteration/misbranding drug offenses received a three-level upward departure from his final adjusted offense level. One of the reasons given for the upward departure was that the Guidelines did not provide for defendant's additional uncharged but admitted crimes of 152 additional product dose tamperings -- the question of first impression addressed was how many units were "significantly more than five" in USSG § 3D1.4 -- here there was no doubt the admitted relevant conduct offenses were "significantly more."

2. United States v. Campos, 362 F.3d 1013 (8th Cir. 2004). Trial court's sentence reduction based on drug quantity for personal use conflicted with the jury's verdict that the entire amount was intended for distribution; case remanded for resentencing at higher range.

3. United States v. Slicer, 361 F.3d 1085 (8th Cir. 2004). A prior suspended sentence for a felony drug offenses qualifies for the twenty-year mandatory minimum enhancement under 21 U.S.C. § 841(b)(1)(A).

4. United States v. Warren, 361 F.3d 1055 (8th Cir. 2004). Defendant's failure to object to classification of

conviction for second degree burglary as a crime of violence (because it involved burglary of a commercial structure) in the PSR precluded any challenge to the finding he was a career offender.

5. United States v. Davis, 360 F.3d 901 (8th Cir. 2004). Defendant's use of a different gun (in a carjacking incident 10 days before) from the one found on his person when he was arrested for violating his supervised release did not invalidate enhancement of his sentence for committing another felony offense, even though the other offense was not contemporaneous with the instant crime nor the gun the same.

6. United States v. Dixon, 360 F.3d 845 (8th Cir. 2004). Convictions which been invalidated on constitutional grounds cannot be considered in determining a criminal history score.

7. United States v. Poor Bear, 359 F.3d 1038 (8th Cir. 2004). Trial court's factual finding obtained from objected-to portion of presentence report, for which no evidence was presented at the sentencing, could not serve as basis for sentence.

8. United States v. Henkel, 358 F.3d 1013 (8th Cir. 2004). Term of supervised release prohibiting defendant from frequenting bars and taverns selling alcohol was supported by history in the PSR that defendant had an alcohol and substance abuse problem.

9. United States v. Stolba, 357 F.3d 850 (8th Cir. 2004). Defendant's pre-investigation destruction of records did not amount to willful obstruction, therefore a guideline enhancement for obstruction of justice did not apply.

10. United States v. Fortney, 357 F.3d 818 (8th Cir. 2004). Substantive due process challenged to the sentencing enhancements (here, specifically increasing the endangerment to human life factor by three levels) rejected.

11. United States v. Cole, 357 F.3d 780 (8th Cir. 2004). A sentencing enhancement based on danger to "national security, public health, or safety" was not applicable to a case involving a "empty" phone threat that defendant had sent anthrax to a public school; only "real" threats call for application of the enhancement.

12. United States v. Muro, 357 F.3d 743 (8th Cir. 2004). Defendant's pre-sentencing flight from the jurisdiction because he felt threatened by persons concerning payment for drugs the DEA had seized from him was not an "exceptional" circumstance and he disqualified him from a downward departure for acceptance of responsibility; although trial court believed

defendant feared for his safety, it also noted he could have contacted pretrial services or the DEA about the threat.

13. United States v. Chapman, 356 F.3d 843 (8th Cir. 2004). An "atypical post-offense rehabilitation can by itself be the basis for" downward departure and absence of acceptance of responsibility is not necessarily preclusive of a departure.

14. United States v. Weasel Bear, 356 F.3d 839 (8th Cir. 2004). Defendant pled guilty to robbery and second degree murder, but his sentence was permissibly cross referenced to the guideline for first degree murder because the situs of a killing associated with federal robbery is not important to application of the guidelines; however 55-year sentence for robbery was more than statutory maximum (15 years) and case remanded for resentencing on that count.

15. United States v. Martinez-Cortez, 354 F.3d 830 (8th Cir. 2004). Defendant's post-plea/pre-sentencing modifications of state court sentences after they had been served "for reasons unrelated to his innocence or errors of law" could not be considered and the trial court could not reduce his criminal history points to consider him eligible for safety valve relief.

G. Habeas

1. Baldwin v. Reese, ___ U.S. ___, 124 S. Ct. 1347 (2004). If the state court must read materials beyond a habeas petition to find the federal claim, it is not "fairly presented" for purposes of the habeas statute.

2. Ford v. Norris, ___ F.3d ___, 2004 WL 784763 (8th Cir. April 14, 2004). Failure by trial counsel to object to statements made by the prosecutor during closing argument on the basis they were false and outside the record did not raise an issue of federal law, but one of state law which could not be resolved in habeas proceedings.

3. Reagan v. Norris, ___ F.3d ___, 2004 WL 736841 (8th Cir. April 7, 2004). In a jury trial concerning the death of defendant's girlfriend's young daughter, counsel's failure to object to omission of an essential of the crime of first-degree murder, the word "knowingly," was not only deficient performance but prejudicial where the evidence against defendant was not necessary "so overwhelming." The conflict of interest claim raised (defense counsel represented defendant and his girlfriend and also represented the girlfriend at a custody hearing) was not addressed as the circuit was certain the "bizarre and somewhat unique factual scenario" would not be repeated at retrial.

4. Beck v. Bowersox, 362 F.3d 1095 (8th Cir. 2004). Defendant's waiver of Miranda rights was not voided by the fact the attorney contacted to represent him was not told of his arrest until three days later, even though she had asked the prosecutor and sheriff's department to notify her of an arrest before her client was questioned. Furthermore, the right to counsel does not attach when a warrant affidavit was filed nor at the time of arrest.

5. Jones v. Luebbers, 359 F.3d 1005 (8th Cir. 2004). Trial judge's expression of anger and annoyance towards counsel in other proceedings, not shown to be in the presence of a jury, was not grounds for disqualification, particularly where it was not shown that the judge had any bias towards the defendant. Furthermore, trial judge's refusal to recuse himself from his own disqualification hearing did not violate clearly established federal law.

6. Bailey v. Mapes, 358 F.3d 1002 (8th Cir. 2004). Petitioner's argument that Knowles v. Iowa should be retroactively applied to invalidate a search of his automobile which resulted in a drug trafficking conviction was correctly rejected because certiorari had been granted in Knowles before he was sentenced; Knowles was decided before his conviction was affirmed by the Iowa Court of Appeals; and petitioner had not raised a fourth amendment claim at trial or on direct appeal.

III. CIVIL RIGHTS

A. First Amendment

1. Locke v. Davey, ____ U.S. ____, 124 S. Ct. 1307 (2004). State scholarship program which excluded religious degree programs did not violate the Free Exercise Clause.

2. Howard v. Columbia Public School District, 363 F.3d 797 (8th Cir. 2004). No constitutional violation arose from termination of principal's contract after there were complaints from school staff and parents concerning her leadership and interpersonal relationship skills. This case stands first for the proposition that the summary judgment battle is not won based on the quantity of paper filed -- here the circuit noted plaintiff's appendix contained 3,158 pages of material, much of which was "made without personal knowledge, consist[ed] of hearsay, or purport[ed] to state legal conclusions as fact." Plaintiff claimed she was removed from her position as elementary school principal based on "her speaking out in favor of aggressive literacy training and against the exclusionary treatment of minority, disabled, disadvantaged and special needs children," goals which the school district also advocated. Evidence regarding the motivations of the officials who did not renew her contract consisted of her testimony that "there's no other logical reason" and "[the official] might not have liked what he read in [my principal's report]," both answers speculative.

B. Fourth Amendment

1. Doran v. Eckold, 362 F.3d 1047 (8th Cir. 2004). "Dynamic entry" procedure by which police officers announced their presence and purpose at the same time as they entered (with force) a house with a search warrant was not justified by exigent circumstances stated only in generalizations: a "'safety factor' involved in raiding drug houses;" the presence of "violent, armed people in drug houses;" and an assumption there would be lethal fumes from methamphetamine manufacturing. "[T]he police interest should be specific to the individual and the place, not generalized to a class of crime. Chief Judge Loken from the Fourth Amendment ruling on the basis that the invading officers were acting under the authority of a warrant they had not obtained but only charged with executing, indeed the investigating officer who obtained the warrant was not sued.

2. Lawyer v. City of Council Bluffs, 361 F.3d 1099 (8th Cir. 2004). The fact an arresting officer did not mention all of the facts on which he relied in demanding a passenger reveal the contents of a pouch during a traffic stop did not vitiate the facts supporting probable cause stated in his written report following the arrest of the occupants of the vehicle, one for failing to sign a traffic citation and the other for interfering with official acts by urging the driver he did not have to comply with the officer's directions.

C. Qualified Immunity

1. Bankhead v. Knickrehm, 360 F.3d 839 (8th Cir. 2004). Where state-employee plaintiffs put forward no evidence showing that a woman was selected for a supervisory position over them for any reason other than her qualifications, the state supervisors who hired her were entitled to qualified immunity insofar as they were performing a discretionary function.

2. Moran v. Clarke, 359 F.3d 1058 (8th Cir. 2004). It was not reasonable for police officials to "believe it was permissible to hatch a plan to scapegoat an innocent officer for acts of police brutality against a developmentally disabled citizen;" therefore, they were not entitled to qualified immunity.

D. Miscellaneous Constitutional Claims

1. Frew v. Hawkins, ___ U.S. ___, 124 S. Ct. 899 (2004). Federal court enforcement of a consent decree entered into by state officials concerning meeting federal requirements for an Early and Periodic Screening, Diagnosis and Treatment program for children did not violate the Eleventh Amendment.

2. Gatlin v. Green, 362 F.3d 1089 (8th Cir. 2004). There was no state-created danger or special relationship which imposed a duty on police officers to protect a cooperating witness from harm that would sustain a claim under 42 U.S.C. § 1983.

IV. LABOR AND EMPLOYMENT

A. General Issues

1. Watson v. O'Neill, ___ F.3d ___, 2004 WL 736839 (8th Cir. April 7, 2004). Although plaintiff made out a prima facie case of retaliation for making an EEOC complaint about

failing to hire him for another position, he did not raise the retaliation claim in his subsequent complaint to the EEOC, thus precluding his retaliation claim because he failed to exhaust his administrative remedies.

2. Weyers v. Lear Operations Corp., 359 F.3d 1049 (8th Cir. 2004). Defendant was prejudiced by the trial court's evidentiary ruling which prohibited it from impeaching the plaintiff with her prior sworn EEOC statement: the statement detailed only a few age-related incidents, but at trial plaintiff testified to continuous incidents of age-based harassment. "[E]vidence bearing on witness credibility was of special importance in the present case, given the relatively short time that Weyers had worked for Lear [just less than ninety days] and the size of the verdict that was returned" [just under $900,000, remitted to $718,962].

B. Age Discrimination

1. General Dynamics Land Systems, Inc. v. Cline, __ U.S. ___, 124 S. Ct. 1236 (2004). The ADEA does not prevent an employer from favoring older employees over younger ones.

2. Erenberg v. Methodist Hospital, 357 F.3d 787 (8th Cir. 2004). Plaintiff's age discrimination claim failed as she could not show she was qualified for her position where the employer consistently identified and regularly communicated to her work performance deficiencies. Her hostile work environment sexual harassment claim failed as the limited incidents alleged were not actionable (two or three incidents of calling plaintiff "Malibu Barbie," the exchange of backrubs in the workplace (a hospital emergency room), some sexual joking, another female touching male employees on their shoulders, arms and backs.)

3. Hitt v. Harsco Corp., 356 F.3d 920 (8th Cir. 2004). Plaintiff's termination for fighting with his son-in-law at work was a non-discriminatory reason; he could not show pretext as both he and his younger son-in-law were terminated. While foreman and supervisor may have made comments about plaintiff being too old to be fighting, these were stray remarks by nondecisionmakers; the actual decisionmaker was at the home office and did not know the ages of the combatants.

C. Disability Discrimination

1. Murphey v. City of Minneapolis, 358 F.3d 1074 (8th Cir. 2004). In state disability benefits application plaintiff did not make a representation that he was totally and permanently disabled, only his physician did in a separate section of the application; therefore, plaintiff's ADA claim that he could perform essential job functions with or without accommodation was not inconsistent with his receipt of those benefits.

2. Kramer v. Banc of America Securities, L.L.C., 355 F.3d 961 (8th Cir. 2004). The Eighth Circuit holds in a case of first impression that compensatory and punitive damages are not available for a claim of retaliation under the ADA. Furthermore, because the only remedy available was equitable, there is no statutory right to a jury trial.

3. Peebles v. Potter, 354 F.3d 761 (8th Cir. 2004). McDonnell Douglas analysis does not apply to an ADA failure to accommodate claim, instead a "'modified burden-shifting analysis'" is applied. Even applying this standard, plaintiff's accommodation request which would require an exception to an applicable work rule poses an undue burden on an employer, failing to cause a genuine issue of fact as to plaintiff's request for an exception. Because the requested accommodation was unreasonable, the employer did not fail in engage in the required interactive process.

4. Whitlock v. Mac-Gray, Inc., 345 F.3d 44 (1st Cir. 2003). The First Circuit has held that an employee diagnosed with attention deficit hyperactivity disorder (ADHD), for which he was prescribed Ritalin and originally allowed a sheltered workspace and music to block background noise, was not disabled under the ADA as the evidence did not show he was substantially limited from performing a class or broad range of comparable jobs.

5. Fraser v. Goodale, 342 F.3d 1032 (9th Cir. 2003), cert. denied, 124 S. Ct. 1663 (2004). The Ninth Circuit holds plaintiff presented a genuine issue of material fact whether her condition of brittle diabetes (which requires multiple daily blood sugar tests and injections) substantially limited the major life activity of eating such that she was disabled under the ADA.

D. Sex, Race, National Origin Discrimination

1. Henthorn v. Capitol Communications, Inc., 359 F.3d 1021 (8th Cir. 2004). Male supervisor's comments and repetitive and annoying requests that plaintiff go out with him were "inappropriate, immature, and unprofessional," but did not amount to sexual harassment since he did not touch her inappropriately or make sexual comments about her in her presence. Plaintiff also failed to make out a prima facie case of retaliation as the terms and conditions of her employment did not change after she rejected her supervisor's requests and she admitted her work was not the quality of co-workers.

2. Cherry v. Ritenour School District, 361 F.3d 474 (8th Cir. 2004). Where school district articulated plaintiff's work performance as the reason for non-renewal of her contract as a school counselor, plaintiff did not identify white staff members who were similarly situated yet treated differently nor offer did she offer evidence showing she assisted in after-school hours, utilized requested computer programs or increased her accessibility, all points of performance at issue from the beginning.

3. Wheeler v. Aventis Pharmaceuticals, 360 F.3d 853 (8th Cir. 2004). Female plaintiff, who was terminated for horseplay involving grabbing male co-workers crotches, claimed discriminatory termination based on race and gender; however, court found a white co-worker's conduct in exposing her breasts on request was not similar conduct; comments by two co-workers concerning "untouchables" were irrelevant as no hostile work environment claim had been made; and fact that those co-workers who were interviewed were the ones who had been touched was a valid business judgment about the scope of investigation.

4. Sellers v. Mineta, 358 F.3d 1058 (8th Cir. 2003). In December 2003 plaintiff's claims of sexual harassment and assault by a co-worker were resolved by the circuit holding she could obtain only one recovery for the two claims submitted (assault and battery). In the present case, the saga continues with claims of hostile work environment and retaliation resulting in plaintiff's termination from employment. Here the circuit holds that an employee's post-termination misconduct may be relevant in considering the availability of front pay and the extent of any award. However, as there was no finding that plaintiff's misconduct would have barred reinstatement, award of front pay was vacated and the case remanded to the district court for further findings.

5. Joens v. John Morrell & Co., 354 F.3d 938 (8th Cir. 2003). Foreman from one of several production lines served by the plant box shop in which plaintiff worked was not a supervisor for purposes of the Faragher/Ellerth analysis -- he may have used abusive tactics on plaintiff to obtain more boxes for his line, but that was not proof that he had direct authority to control her work other than as another "customer" of the box shop nor was there evidence he ever "wrote up" or made complaint about plaintiff's job performance to management, as she claimed he had the power to do. Finally, there was no evidence the co-worker's conduct was based on sex -- his yelling was merely offensive.

6. Marquez v. Bridgestone/Firestone, Inc., 353 F.3d 1037 (8th Cir. 2004). As part of proving similarly situated employees were treated more favorably, plaintiff's evidence based only on her own opinion did not create a prima facie and even assuming a prima facie case, plaintiff could not prove the nondiscriminatory reason given for the employer's action, plaintiff's lengthy disciplinary record, was false or pretextual.

E. Equal Pay

1. Horn v. University of Minnesota, 362 F.3d 1042 (8th Cir. 2004). Male assistant coach of women's hockey team claimed he was paid less than a female assistant coach, retaliated against for complaining and constructively discharged. While the assistants shared a number of basic coaching duties, the female assistant's duties included public relations, recruiting and administrative assistant, the two positions were not substantially equal. Plaintiff could not show retaliation where he not only retained his job with the university, he was offered an extended contract term at an increased salary.

F. ERISA

1. Shaw v. McFarland Clinic, P.C., 363 F.3d 744 (8th Cir. 2004). Plaintiff's action for abuse of discretion arising from her self-insured employer's denial of preauthorization for surgery designed to relieve the effects of polio in her left calf muscle was analogized to an action against an insurer for denial of coverage, i.e., breach of contract, which had a ten-year statute of limitations under Iowa law.

G. Miscellaneous

1. Kohrt v. MidAmerican Energy Co., ___ F.3d ___, 2004 WL 769722 (8th Cir. April 13, 2004). In this wrongful discharge case the circuit "hesitantly" predicts that the Iowa Supreme Court would recognize an action for wrongful discharge in violation of public policy behind the Iowa Occupational Safety and Health Act (IOSHA) "to encourage employees to improve workplace safety."

2. Zbylut v. Harvey's Iowa Mgt. Co., 361 F.3d 1094 (8th Cir. 2004). Plaintiff was hired as an engineer on a riverboat casino vessel and claimed he was ordered to falsify log books, his complaints about which he claimed led to harassment by supervisors and he eventually quit. First, the

circuit concludes admiralty law did not preempt the state law wrongful discharge claim. With respect to the refusal to violate law, the evidence was that plaintiff did not refuse to falsify the logs books -- the court declined to extend the public policy exception to these circumstances.

3. Williams v. George P. Reintjes Co., 361 F.3d 1073 (8th Cir. 2004). Plaintiff's state law claims of fraud, negligent misrepresentation and conversion on the basis his employer represented he was not entitled to benefits mandated by a CBA and converted monies that should have been paid to the union were preempted by § 301 of the Labor Management Relations Act and barred by its six-month statute of limitations.

4. Int'l Ass'n of Bridge, Structural, Ornamental, and Reinforcing Ironworkers v. EFCO Corp., 359 F.3d 954 (8th Cir. 2004). It is up to an arbitrator to decide whether procedural prerequisites have been complied with or waived, and not the courts.

5. Gray v. AT&T Corp., 357 F.3d 763 (8th Cir. 2004). Communications to various employees involved in processing paperwork following plaintiff's termination for misconduct fell within Missouri's "intra-corporate communications rule" in defense of plaintiff's claim she was defamed by the distribution of that information.

V. PRISONER RIGHTS

A. Procedure

1. Brown v. Mo. Dep't of Corrections, 353 F.3d 1038 (8th Cir. 2004). Plaintiff's complaint that five correctional officers refused to fasten his seatbelt when he was fully shackled stated an Eighth Amendment claim which should have been allowed to proceed.

B. First Amendment

1. Goff v. Maschner, 362 F.3d 543 (8th Cir. 2004). Inmate members of a prison religion known as CONS (Church of the New Song) were rightfully denied banquet trays to lock-up inmates during the group's annual "celebration of life" feast as there were legitimate penological reasons for banning the traps: preventing contraband in lock-up and difficulty in searching the food trays.

VI. MISCELLANEOUS

A. Admiralty Law

1. MO Barge Lines v. Belterra Resort Indiana, 360 F.3d 885 (8th Cir. 2004). A case demonstrating the distinctions between admiralty law and standard civil law in the context of a collision between two moving objects, here a casino riverboat and a towboat. Here the "master" or owner of the ship is not necessarily the "commander" for purposes of liability -- admiralty law provides liability of the owner may be limited if he equips a vessel properly and hires competent crew to operate it -- the owner is not liable for crew error under such circumstances.

B. Antitrust

1. USPS v. Flamingo Industries, Ltd., ___ U.S. ___, 124 S. Ct. 1321 (2004). The Postal Service terminated its contract with Flamingo under which Flamingo made mail sacks. Flamingo's antitrust lawsuit failed as the Postal Service is not subject to antitrust liability.

2. Craftsmen Limousine, Inc. v. FMC, 363 F.3d 761 (8th Cir. 2004). *Per se* rule of analysis should not have been applied to this lawsuit concerning restraints on the limousine building market as safety concerns were arguably a motivating factor behind creation of vehicle certification programs created by various automobile manufacturers.

C. Contract

1. Winthrop Resources Corp. v. Eaton Hydraulics, Inc., 361 F.3d 465 (8th Cir. 2004). A lease provision which set out a casualty loss value for computer equipment was a permissible liquidated damages clause, the values for which were negotiated prior to signing the contract.

D. ERISA

1. Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, Trustee, ___ U.S. ___, 124 S. Ct. 1330 (2004). A "working owner of a business" may be a "participant" in an ERISA pension plan (i.e., an employee) and may participate equally with other plan participants, if there are any.

2. McGee v. Reliance Standard Life Ins., 360 F.3d 921

(8th Cir. 2004). Plan administrator was not required to give deference to the opinion of a participant's treating physician over that of its reviewing physician in determining to terminate long-term disability benefits.

3. Minnesota Laborers Health and Welfare Fund v. Scanlan, 360 F.3d 925 (8th Cir. 2004). While owner of an unincorporated entity was also sole shareholder of a related closely-held corporation, he could not held solely liable for delinquent fringe benefit contributions on that basis, but could be held liable jointly and severally with unincorporated entity.

4. Computer Aided Design Systems, Inc. v. Safeco Life Ins. Co., 358 F.3d 1011 (8th Cir. 2004). Self-insured employer/plan administrator retained authority to decide whether claims were covered and excess loss insurer had no authority to review claims -- here employer decided to pay treatment proposed for an employee's Stage IV breast cancer where its oncologist disagreed with the excess loss insurer's oncologists regarding whether the proposed treatment was medically necessary or experimental.

5. King v. Hartford Life and Accident Ins. Co., 357 F.3d 840 (8th Cir. 2004). Adopting and applying the test from Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990), the circuit concludes that death as a result driving while drunk is an "unexpected" outcome under policy language, requiring payment of double indemnity benefits.

E. Freedom of Information

1. National Archives and Records Admin. v. Favish, _ U.S. ___, 124 S. Ct. 1570 (2004). The right of family members to personal privacy regarding death-scene picture's of a close relative (here Vincent Foster, former deputy counsel to President Clinton) is recognized by FOIA and their interest also outweighs any public interest in disclosure.

F. Immigration

1. Eusebio v. Ashcroft, 361 F.3d 1088 (8th Cir. 2004). Although applicant school teacher had been subjected to beatings and jailing in his native country of Togo, after he participated in opposition demonstrations, his house was destroyed after he fled during a failed coup, and he was arrested for giving the son of the opposition leader a failing grade in school, he did not meet his burden of proving he had a "well-founded fear of future persecution on the basis of . . .

political beliefs." Judge Lay dissents.

G. Insurance

1. Assicurazioni Generali S.P.A. v. Black & Veatch Corp., 362 F.3d 1108 (8th Cir. 2004). Addressing a loss claim under a marine cargo insurance policy, the circuit found that an endorsement created after a typhoon damaged items in a shipment was insufficient to create a list of "critical items" which required pre-shipment survey in order for the loss to be covered. Furthermore, Black & Veatch's expenditure of $38 million to make sure construction project for which items were needed was completed on time qualified as meeting the requirement that an assured take steps to minimize loss.

2. American Home Assur. Co. v. Pope, 360 F.3d 848 (8th Cir. 2004). "Criminal act" exclusion of professional liability policy did not exclude claim that psychologist violated common law duty to warn victim or caregiver of potential of future danger from a patient.

3. Modern Equipment Co. v. Continental Western Ins. Co., 355 F.3d 1125 (8th Cir. 2004). Where storage racks provided by Modern Equipment were not an integral part of a freezer and cooler warehouse and their collapse did prevent the freezer from operating as a freezer, the inability to store as much beef product was not a loss occurring "suddenly and accidentally" within the terms of a commercial general liability policy.

4. Archer Daniels Midland Co. v. Aon Risk Services, Inc., 356 F.3d 850 (8th Cir. 2004). "Interruption of business" under a contingent business interruption and extra expense policy that insurer admitted it was supposed to have obtained did not require suspension of operations before loss of earnings coverage could apply; also, because policy did not limit extra expense coverage with reference to earnings or profits, the fact that ADM passed on some extra corn expense to customers was not an impermissible windfall.

5. Berardinelli v. General American Life Ins. Co., 357 F.3d 800 (8th Cir. 2004). Where plaintiff received notice of proposed class action settlement regarding health insurance company modal billing practices and failed to opt out, she was bound by the settlement and her personal suit was barred.

6. Kolb v. Paul Revere Life Ins. Co., 355 F.3d 1132 (8th Cir. 2004). Rare post-surgical complications causing orthopedic surgeon to lose a substantial portion of his vision constituted "accidental bodily injury" and not "sickness" under terms of disability insurance policy, even though he was informed loss of vision was a potential risk associated with the eye surgery involved, particularly where policy did not contain an exclusion for known risks or complications of surgery.

H. Regulatory Law

1. Verizon Communications, Inc. v . Trinko, __ U.S. ___, 124 S. Ct. 872 (2004). Where wireless carrier was already extensively regulated by the FCC and a state public service commission, it could not be liable under the Sherman act for failing to aid its competitors.

I. RICO

1. Popp Telecom, Inc. v. American Sharecom, Inc. 361 F.3d 482 (8th Cir. 2004). RICO claims concerning securities are barred under the Private Securities Litigation Reform Act of 1995 ("PSLRA") even if based on conduct predating the act if suit is brought after the effective date of the act.

J. Securities

1. SEC v. Edwards, ____ U.S. ____, 124 S. Ct. 892 (2004). A payphone "sale-and-leaseback arrangement" which promised a fixed return qualifies as an "investment contract" subject to federal securities laws.

K. Tax

1. United States v. Galletti, ___ U. S. ___, 124 S. Ct. 1548 (2004). Where a partnership has been properly assessed taxes, that assessment triggers the ten-year statute of limitations against the general partners even though they have not been separately assessed within the required three-year time period.

2. Oren v. CIR, 357 F.3d 854 (8th Cir. 2004). Loans by controlling shareholder of related S-corporations to two of them based on a loan he received from the third and then passed did not constitute an actual economic outlay qualifying him for an increase in basis and equivalent deductions based on the losses of the receiving S-corporations.

L. Torts

1. Olympic Airways v. Husain, ___ U. S. ___, 124 S. Ct. 1221 (2004). A flight attendant's refusal to move passenger on international flight to a section where he would not be exposed to second-hand smoke constituted an "accident" under the Warsaw Convention and airline was liable for wrongful death of passenger when he had an asthma attack because of the smoke and died during the flight.

2. Demery v. US Dep't of Interior, 357 F.3d 854 (8th Cir. 2004). The Bureau of Indian Affairs' decision to aerate a lake and maintenance of open water fell within the discretionary function exception to the Federal Tort Claims Act; therefore court lacked subject matter jurisdiction over plaintiff's wrongful death claim after his wife drowned in lake when the snowmobile on which she was riding went into the open water.

M. Trade Secrets

1. Children's Broadcasting Corp. v. The Walt Disney Co., 357 F.3d 860 (8th Cir. 2004). This is no "Mickey Mouse" case -- after misappropriating plaintiff's list of advertisers, a verdict against Disney in the amount of $9.5 million (including $2,567,082.19 in prejudgment interest) was held to be within the evidential parameters of the case.